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IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1971
No. 71-1037

MITZI LEE REDKE,

Respondent,

vs.

ABRAHAM SILVERTRUST and JOHN ERVIN, as Executors of the Estate of Samuel Hayden, Deceased; ABRAHAM SILVERTRUST and RUTH K. ALLENDER HAYDEN, as Co-Trustees of the Amended Samuel Hayden Trust No. 1; RUTH K. ALLENDER HAYDEN; ABRAHAM SILVERTRUST and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Testamentary Co-Trustees under the Will of Ann Gollos Hayden, Deceased,

Petitioners.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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SUBJECT INDEX

Page

I.

Opinions of the Courts Below 2

II.

Jurisdiction 2

III.

No Federal Statutes or Regulations Are Involved 3

IV.

Questions Presented 3

V.

Statement of the Facts 4

A. The Facts Established in the State Court Action 4

B. The Petitioners' Statement of Facts Is Misleading and Distorted 9

C. There Are No Conflicting Decisions by the California Courts 11

D. Timeliness of the Federal Question 11

VI.

Argument 12

A. No Substantial Federal Question Is Presented 12

B. The Determination of the Within Case Was Based Solely on Well Established California Law 15

C. The Questions Presented by Petitioners Have Been Considered and Fully Answered by the State Court 16

D. The Cases Relied Upon by Petitioners Are Inapplicable to the Instant Case 19

Page

E. The Federal Question Asserted Is Not Substantial, Lacks Color of Merit, and the Petition for Writ of Certiorari Should Be Denied 22

VII.

Conclusion 22

INDEX TO APPENDICES

Appendix A.

Opinion of the Supreme Court of the State of California 1

Modification of Opinion 16

Appendix B.

Respondent's Brief, pages 29-42.

The Agreement Is Legal and Enforceable 18

Respondent's Brief, pages 45-51 31

TABLE OF AUTHORITIES CITED

Cases	Page
Batterton v. United States (5th Cir. 1968), 406 F. 2d 247	19, 20
Black v. Cutter Labbratories, 351 U.S. 292, 76 S. Ct. 824	13, 22
Colonell v. Goodman, 78 F. Supp. 945 (E.D. Pa. 1948)	21
Commissioner of Int. Rev. v. Thomas Flexible Coupling Co., 198 F.2d 350	14
Dekker v. United States, (1965 D.C.S.D. Ill.) 245 F. Supp. 255	20
Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 85 S.Ct. 871	12
Dugger v. Bocock, 104 U.S. 596, 26 L.Ed. 846	13
First Nat'l Bank of Janesville v. Nelson (7th Cir. 1966), 355 F.2d 546, 17 AFTR 2d 1338	19, 20
Frueler v. Helvering, 291 U.S. 35, 54 S.Ct. 308	14
Gaston, Williams & Wigmore v. Warner, 260 U.S. 201, 43 S.Ct. 18	14
Grand Trunk Western R. Co. v. Chicago W. Ind. R. Co., 131 F.2d 215	14
Hazelton v. Sheckels, 202 U.S. 71 (1906)	21
LeJohn Manufacturing Company v. Webb, 222 F. 2d 48 (D.C. Cir. 1955)	21
Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16	12, 13
Marshall v. The Baltimore and Ohio Railroad Co., 57 U.S. 314 (1853)	21
McCabe v. Bagby, 186 F.2d 546	14
McMullen v. Hoffman, 174 U.S. 639 (1899)	21

Page

Milk Wagon Driver's Union, Etc. v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, Rehear. den., 312 U.S. 715, 61 S.Ct. 803 ..... 4, 13

Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission, 193 U.S. 53, 24 S.Ct. 396 4

Missouri, K & T Trust Co. v. Krumseig, 172 U.S. 351, 19 S.Ct. 179 14

Monarco v. LoGreco, 35 Cal.2d 621 16

New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 22 S.Ct. 691 22

Noonan v. Gilbert, 68 F. 2d 775 (D.C. Cir. 1934) 21

Northwest Airlines, Inc. v. Alaska Airlines, Inc., 351 F. 2d 253 (9th Cir. 1965) 21

Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co., 97 F.Supp. 952 (D.C. Md. 1951), affd. 194 F. 2d 89 (4th Cir. 1952) 21

Platt v. Wells Fargo Bank, 222 Cal.App.2d 658 ..... 16, 20

Ponce v. Marr, 47 Cal.2d 159 ..... 2, 11

Providence Tool Co. v. Norris, 69 U.S. 45 (1865) 21

Redke v. Silvertrust (1971), 6 Cal.3d 94, 98 Cal. Rptr. 293, Mod. Op., 6 Cal.3d 374a 2, 11, 12, 15, 16, 18, 20

Simons, In Re, 247 U.S. 231, 38 S.Ct. 497 14

Warner Bros. Theatres v. Cooper Foundation, 189 F. 2d 925 (10th Cir. 1951) 21

Weil v. Neary, 272 (Sic; 278) U.S. 160 (1929) 21

Weitzel v. Brown-Neil Corporation, 152 F. Supp. 540 (N.D.W.Va. 1957), aff'd. 251 F. 2d 611 (4th Cir. 1958) 21

Page

West Covina Enterprises, Inc. v. Chalmers, 49 Cal. 2d 754 16

Williams v. Kaiser, 323 U.S. 471, 65 S.Ct. 363 13

Regulations

United States Treasury Estate Tax Regulations, Sec. 2056(b)(5)(g)-(2) 3, 19

United States Treasury Estate Tax Regulations, Sec. 2056(c)-2(a)(5) 3

Rules

California Rules of Appellate Court, Rule 28 ..... 2, 11

California Rules of Appellate Court, Rule 29 ..... 2, 11

Revenue Ruling 71-51 IRB 1971-5, p. 15 20

Rules of Supreme Court, Rule 1(a) 2

Rules of Supreme Court, Rule 19 ..... 2, 12

Statutes

United States Code, Title 26, Sec. 2056 3

United States Code, Title 28, Sec. 1257(3) 2

Textbook

Prentice-Hall Fed. Estate and Gift Tax Service, Sec. 142,357 20

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ABRAHAM SILVERTRUST and JOHN ERVIN, as Executors of the Estate of Samuel Hayden, Deceased; ABRAHAM SILVERTRUST and RUTH K. ALLENDER HAYDEN, as Co-Trustees of the Amended Samuel Hayden Trust No. 1; RUTH K. ALLENDER HAYDEN; ABRAHAM SILVERTRUST and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, as Testamentary Co-Trustees under the Will of Ann Gollos Hayden, Deceased,

Petitioners.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Mitzi Lee Redke, submits the following Brief in Opposition demonstrating that the pending Petition for Writ of Certiorari should be denied. Petitioners have distorted and misstated the real questions involved. There is no substantial federal question involved, as the true facts will demonstrate, since the decision was based solely upon California contract and trust law and, in reality, does not involve a question of public policy, federal or otherwise.

I.
OPINIONS OF THE COURTS BELOW

A. For convenience we incorporate the decision of the California Supreme Court, *Redke v. Silvertrust* (1971), 6 Cal.3d 94, 98 Cal.Rptr. 293, and Modification of Opinion, 6 Cal.3d 374a, as Appendix A, although the same is incorporated in the Petition for Writ of Certiorari.

B. The Opinion of the California Court of Appeal (16 Cal.App.3d 355, 93 Cal.Rptr. 898 (1971)), by reason of a hearing granted by the California Supreme Court, will not be reported in the official reports, and under the law and applicable court rules, is a nullity and of no force and effect. (California Rules of Court, Appellate Rules 28 and 29; *Ponce v. Marr*, 47 Cal.2d 159, 161.)

C. Since petitioners have attached to their Petition the Memorandum Decision of the Los Angeles County Superior Court as Appendix C, we deem it unnecessary to attach either Findings of Fact or the Judgment of the trial court.

II.
JURISDICTION

No jurisdiction exists either under 28 U.S.C. Section 1257(3) or Rule 19, 1(a) of the Rules of the Supreme Court. There is no substantial federal question presented. Although petitioners attempted to inject an issue of federal tax evasion, no such issue was involved. The real question involved related only to the enforceability of the oral contract to make a particular testamentary disposition of property. This issue was decided by the highest court of California based upon local contract and trust law. The oral contract was held to be enforceable.

III.
NO FEDERAL STATUTES OR REGULATIONS ARE INVOLVED

Petitioners erroneously contend that the following federal statutes and regulations are involved:

A. 26 U.S.C. § 2056.

B. U.S. Treas. Estate Tax Reg. §2056(b)(5)(g)-(2).

C. U.S. Treas. Estate Tax Reg. §2056(e)-2(a)(5).

(Petition, Page 3, Appendices D, E and F.)

There are no federal statutes or regulations involved herein. As we will hereinafter demonstrate, the case involved only matters of state contract and trust law.

IV.
QUESTIONS PRESENTED

The questions presented by petitioners are entirely without merit. The California Supreme Court disposed of petitioners' contentions. It held that when the contract was entered into, there was no fraudulent intent to conceal its existence from the tax authorities. The court stated:

> "There was, of course, nothing illegal per se in Sam's oral agreement to leave to Mitzi Sam's share of Ann's separate property, for that agreement could have been carried out in an entirely legal manner had Sam disclosed its existence to the tax authorities, or chosen not to claim the marital deduction." (App. A, p. 6; See also Argument, Point C, *infra*, p. 16.

Petitioners would have this Court put its stamp of approval on an outright breach of agreement entered into by a fiduciary because that fiduciary later chose to not disclose the agreement and his breach of it. If there was a tax fraud involved, Sam Hayden caused it in furtherance of his breach of the agreement, and long after Ann's death.

V.

STATEMENT OF THE FACTS

A. The Facts Established in the State Court Action

The facts found by the trial court, set forth in its Memorandum of Decision [Pet. App. C; 3 C.T. 740-759][1], reiterated in its Findings of Fact [1 C.T. 148-206], incorporated in its Judgment [1 C.T. 207-218], and approved and sustained by the California Supreme Court (Pet. App. A), are clear and simple.[2]

On May 15, 1955, Sam, a widower of 71, father of three adult children, skilled in business and finance, and a man of substantial wealth, married Ann, aged 50, mother of two adult children, Mitzi, plaintiff and respondent, and Warren. [1 R.T. pp. 33-36; Ex. 70, 4 R.T. 1009, 16 R.T. 3925; 6 R.T. p. 1408; 13 R.T. pp. 3364-3366; 1 C.T. p. 149.] Ann was a homemaker, unfamiliar with business matters and ignorant of tax laws. [1 R.T. p. 177; 5 R.T. p. 1298; 6 R.T.

[1]For convenience, we will refer to the Petition for Writ of Certiorari as Pet., the Clerk's Transcript as C.T., the Reporter's Transcript as R.T., and appendix as App.

[2]A finding of fact by a lower state court, affirmed in that state's highest court, is conclusive on the United States Supreme Court in reviewing a judgment of the highest state court. *Minneapolis & St. L. R. Co. v. Minnesota ex rel. Railroad & Warehouse Commission*, 193 U.S. 53, 64-65, 24 S.Ct. 396, 398; *Milk Wagon Driver's Union, Etc. v. Meadowmoor Dairies*, 312 U.S. 287, 294, 61 S.Ct. 552, 555, Rehearing denied, 312 U.S. 715, 61 S.Ct. 803.

p. 1385.] She, at the time, had a net worth estimated at between $20,000 to $40,000. [7 R.T. pp. 1681-1688.] Sam for many years had surrounded himself with the best legal, accounting and tax experts, including Abraham Silvertrust, a certified public accountant, attorneys John Ervin and Leonard Cohen specializing in tax and estate matters, and Nathan Schwartz, also an attorney and certified public accountant. [10 R.T. pp. 2561-2563; 3 R.T. pp. 589-590, 635-636, 638-639; 16 R.T. pp. 4035-4036, 4057-4058; 1 C.T. 149-150.]

Subsequent to their marriage, Sam and Ann kept their estates carefully segregated and Sam caused to be established two completely separate and distinct sets of books and accounting records, one for his separate assets and the other for the separate assets of Ann, supervised by Silvertrust. [1 C.T. p. 150, lines 19-25; 5 R.T. p. 1286, line 23, to p. 1287, line 11; p. 1293, line 17, to p. 1296, line 23.] Sam devoted his business acumen in building Ann's separate property for her benefit and was remarkably successful, in that at the time of her death on April 5, 1963, her separate estate was valued at approximately $1,000,000.00. [11 R.T. pp. 2758; 2764-2765; 14 R.T. p. 3678, lines 1-3; 1 C.T. p. 150, lines 13-18; Ex. PP. 16 R.T. 3929.] At all times during the marriage of Ann and Sam, Sam was the dominant personality and exercised dominant influence in the management of all of their business and legal affairs and in the choice of lawyers, accountants and tax consultants. [5 R.T. p. 1223, line 10, to p. 1224, line 25; 11 R.T. p. 2723, lines 13-25; p. 2761, lines 15-19; p. 2762, lines 6-12; p. 2764, line 22, to p. 2765, line 2; p. 2766, lines 1-26; 12 R.T. p. 2960, line 16, to p. 2963, line 1.] There was a

confidential and fiduciary relationship between them; Ann trusted and relied upon her husband, placing complete faith in his fidelity, honesty and integrity. [Uncontroverted Finding XV; 1 C.T. p. 155; 1 R.T. p. 35; 11 R.T. p. 2854, lines 10-19; 11 R.T. p. 2766; 6 R.T. pp. 1385-1386.]

About two years before Ann's death in 1963, Sam's legal and financial advisers, with Sam's approval, prepared certain wills and *inter vivos* trust agreements for both Sam and Ann, the effect of which was that one half of Ann's separate property would be placed in a marital deduction trust for Sam, giving him a general power of appointment over that property, *and if he failed to exercise the power,* the property would, upon his death, go to Ann's children, Warren and Mitzi. The other one half was placed in trust for her children. [Ex. 30, 3 R.T. 603, Ex. 32, 3 R.T. 605.] Sam's will and trust were similar: one half to Ann with general powers; if the powers were not exercised, then to *Ann's children;* the other half in trust for Ann's children. [Ex. 35, 3 R.T. 663, 692; Ex. 40, 3 R.T. 695 (Sam's separate property was valued at about $3,000,000. See Ex. 70, 4 R.T. 1009, 16 R.T. 3925.)] Thus, both Sam and Ann showed an intention that their separate properties combined would eventually go to Ann's two children, Warren and Mitzi.

On February 22, 1963, Warren, age 37, died unexpectedly from a heart attack. Ann, who had been hospitalized by reason of suffering from terminal cancer and had but recently been released to her home

under nurses' and doctors' care, was informed of her son's death on the following day. [1 R.T. 57-58; 5 R.T. 1245-1247, 1258-1259; 1 C.T. 154.] She was shocked and upset and immediately concerned over the welfare of Mitzi and her four children.

At that time, in the presence of her nurse, Mitzi, and others, Ann told Sam she wanted to be sure Mitzi would get all of her separate property, and insisted Sam call his lawyers to change her Will and do whatever was necessary to carry out her wishes. (Warren's family was adequately provided for, and Ann wanted to be sure Warren's share would go to Mitzi.) Sam assured her it was not necessary to call in the lawyers and that no changes were necessary. Sam promised that if Ann died, he would see to it that all of Ann's property that passed to him would go to Mitzi upon his death. Ann agreed. [1 C.T. 155, lines 19-23; 1 R.T. 63-64; 2 R.T. 250-252, 255-256, 286-288, 403-404; 8 R.T. 2010-2011, 2014-2015.]

In the few weeks remaining before Ann died, through arrangements made by Sam, both Sam's and Ann's trust and will instruments were changed only to the extent of providing for Warren's share to go to Mitzi. [Ex. 33, 3 R.T. 605; Ex. 43, 3 R.T. 696; 3 R.T. 775.] In addition, through Sam's arrangements, most of Ann's remaining property was transferred to her trust. [Ex. 50, 3 R.T. 700.]

Ann died on April 5, 1963, only forty-one days after the bedside promise Sam made to her. [5 R.T. 1251; Ex. 14, 2 R.T. 476.] Immediately following

Ann's death, Sam reaffirmed to others his promise to leave Mitzi his share of Ann's property.[3] He also gave Mitzi certain furs and jewelry that had been Ann's.[4]

In the following month, Sam embarked upon a course of conduct in direct violation of his agreement. In the first week of May, 1963, he met Ruth Allender. (He married her on May 29, 1963.[5]) Shortly after meeting Ruth, Sam caused both his will and his trust agreements to be completely changed. He completely eliminated all provisions respecting respondent Mitzi, and named instead his new wife and his natural children.[6] Sam was appointed Executor of Ann's estate. [Ex. 8, 1 R.T. 130.] On July 6, 1964, a year and three months after Ann's death, and following Sam's remarriage and the complete change in his dispositive instruments affecting all of his property, including the property he received from Ann, Sam claimed the marital deduction without disclosing his agreement with Ann. [Ex. 114, 9 R.T. 2231.]

Sam died January 17, 1965. [Ex. 70, 4 R.T. 1009, 16 R.T. 3925.] It was not until after his death that

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[3]Mitzi: 1 R.T. p. 63, line 4 to p. 64, line 17; p. 69, line 7, to p. 70, line 10; Mary: 2 R.T. p. 286, line 21, to p. 288, line 26; p. 291, lines 9-23; Shiall: 2 R.T. p. 403, line 18, to p. 404, line 17; Malkin: 2 R.T. p. 250, line 25, to p. 252, line 6; p. 255, line 24, to p. 256, line 5; Benedict: 1 R.T. p. 223, line 12, to p. 224, line 1; p. 324; lines 15-22; Stanley: 8 R.T. p. 2010, line 23, to p. 2011, line 22; p. 2014, line 7, to p. 2015, line 3.

[4]1 R.T. p. 67, line 17, to p. 70, line 6; p. 80, line 23, to p. 84, line 18; p. 133, line 2, to p. 134, line 15; 8 R.T. p. 2010, line 23, to p. 2011, line 22; p. 2016, lines 9-25; 1 C.T. p. 164, line 13, to p. 165, line 32, p. 166, lines 19-20.

[5]14 R.T. 3612, line 12, to 3613, line 13, 3646, line 22, to 3650, line 14.

[6]3 C.T. 753, line 27, to 754, line 6; 1 C.T. 160; line 25, to 161, line 8; Ex. 134, 17 R.T. 4275; Ex. 34, 3 R.T. 662, 692; Ex. 43, 3 R.T. 696; 1 C.T. 162, line 26, to 163, line 1.

respondent Mitzi became aware of the fact that Sam had violated his agreement made with his wife Ann in 1963, to leave her separate property to Mitzi. [1 R.T. 139-141, 151-153; 1 C.T. 157, lines 24-27.] This action was then brought in the state court by Mitzi to enforce the agreement and recover the property rightfully hers.

B. The Petitioners' Statement of Facts Is Misleading and Distorted.

Petitioners relate as facts: that *both* Ann and Sam employed qualified tax and legal advisers; that *both* were acutely aware of the importance of estate planning; that after the oral agreement "Ann spoke at length on three separate occasions with her tax and legal advisers concerning these changes" (Pet. p. 6); that she never mentioned any oral agreement *although she inquired about the tax consequences of the changes she made*. This is identical to the posture applicants presented to the trial court and throughout the appellate procedures. It was flatly rejected by the trial court, and again by the state Supreme Court.

With respect to these allegations of fact, the trial court's findings clearly stated:

> ". . . Ann did not at any time have any reason to suspect that her husband would do anything illegal or irregular in the method he would choose to carry out the said agreement to give all of her property, jewels and furs to Mitzi. If Sam, in performing the oral agreement with Ann, intended to or did act contrary to any legal technicalities, Ann had no knowledge thereof or responsibility therefor. Ann acted in good faith at all times. The foregoing facts lulled Ann into relying upon

Sam's oral agreement. Ann did not at any time, purposely or otherwise, conceal from anyone the existence of her oral agreement made on February 23, 1963, with Sam for Mitzi's benefit. . . . From and after February 23, 1963, when Ann made her aforesaid oral agreement with Sam for Mitzi's benefit, Ann was not concerned with the tax consequences thereof." [1 C.T. p. 156, lines 6-21.]

"The aforesaid mutual oral agreement between Ann and Sam for Mitzi's benefit was in all respects clear, certain, unambiguous and legal and did not require any of the parties to do anything illegal in performing it." [1 C.T. p. 181, lines 7-11.]

"Ann acted in good faith at all times and entered into said mutual oral agreement with Sam in good faith and in reliance upon Sam's honesty and integrity and if Sam, in performing said oral agreement, intended to or did act contrary to any legal technicalities, Ann has [had] no knowledge thereof and was not *in pari delicto* with Sam." [1 C.T. p. 181, lines 15-21.]

The trial court's findings were accepted by the state Supreme Court. It found that there was nothing illegal *per se* in the oral agreement; it approved the trial court's findings: that it (the agreement) could have been carried out in an entirely legal manner had Sam disclosed its existence to the tax authorities, or chosen not to claim the marital deduction; that Ann was a housewife with little familiarity with business transactions; that Sam was the dominant influence in managing their legal and financial affairs; that Ann had no part in choosing the method by which Sam would carry out his promise to provide for Mitzi; that after the oral agreement was made, Ann, suffering from terminal cancer, had no concern with the tax consequences of that agreement and had no reason to sus-

pect that Sam would proceed illegally in carrying it out; that it was doubtful Ann had any clear understanding of the technical aspects of a marital deduction. (*Redke v. Silvertrust*, 6 Cal.3d 94, 103; App. A, pp. 6-11.)

In simple words, the holding in the state court was that the contract was entered into with no unlawful intent, there was nothing unlawful about the purpose of the agreement, it was easily capable of being performed in a lawful manner, and at no time did Ann have any reason to suspect that Sam would breach it, or attempt performance in an unlawful manner.

C. There Are No Conflicting Decisions by the California Courts.

Notwithstanding petitioners' statement to the contrary (Pet. p. 13), as we have previously pointed out, by reason of the hearing granted by the California Supreme Court, under the law and applicable court rules, the Opinion of the California Court of Appeal is a nullity and of no force and effect. (California Rules of Court, Appellate Rules 28 and 29; *Ponce v. Marr, supra*, 161.)

D. Timeliness of the Federal Question.

Petitioners state that their primary argument on appeal is that the enforcement of the oral agreement is against public policy (Pet. p. 13) and have attached in support thereof portions of their Opening Brief as Appendix H. Contrary to petitioners' argument, the trial court and the California Supreme Court have agreed with respondent that the oral agreement is legal and enforceable in California. We quote from the California Supreme Court as follows:

"We conclude that in the absence of fraudulent intent by the promisee spouse, an oral agreement

to make a testamentary disposition of the nature involved herein is not void or unenforceable as against public policy. Accordingly that portion of the trial court's judgment which upheld Mitzi's right to enforce Sam and Ann's oral agreement should be affirmed." (*Redke v. Silvertrust, supra,* p. 104; App. A, p. 9.)

Further, in response to Appendix H attached to the Petition, we attach hereto as Appendix B pages 29-42 and pages 45-51 of Respondent's Brief containing the trial court's Finding that the agreement is legal and enforceable, and citing the appropriate California authorities which support the judgment.

VI.
ARGUMENT

A. No Substantial Federal Question Is Presented.

1. The Petition Presents No Ground for Review Under the Applicable Rules in Connection With Reviewing Decisions of the Highest Court of a State.

a.) Before this Court will review a decision of a state court involving local law, it must affirmatively appear from the record that a federal question of substance was presented to the highest court of that state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause.

Lynch v. New York, 293 U.S. 52, 54, 55 S.Ct. 16, 17;

Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 197, 85 S.Ct. 871, 873.

See also:

Supreme Court Rule 19.

b.) A decision of the highest state court is binding on this Court insofar as state law is concerned.

Williams v. Kaiser, 323 U.S. 471, 473, 65 S.Ct. 363, 365.

c.) Where the decision of a state court might have been upon a state ground or a federal ground, and the state ground is sufficient to sustain the judgment, this Court will not undertake to review it.

Williams v. Kaiser, 323 U.S. 471, 478, 65 S. Ct. 363, 367;

Lynch v. New York, 293 U.S. 53, 54-55, 55 S. Ct. 16-17.

2. Matters Involving State Contract and Trust Law Are Not Subject to Review by Writ of Certiorari Unless Substantial Federal Questions Are Directly Concerned.

a.) Where a California Supreme Court decision involved only the construction of a contract under local law, no substantial federal question was presented, and the petition will be dismissed.

Black v. Cutter Laboratories, 351 U.S. 292, 299, 76 S.Ct. 824, 828.

b.) This Court will not substitute its judgment for that of a state court on matters involving:

1.) Local public policy.

Milk Wagon Driver's Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 294, 61 S.Ct. 552, 555. Rehearing denied, 312 U.S. 715, 61 S.Ct. 803.

2.) General principles of public policy where the question concerns the validity of a contract.

Dugger v. Boppek, 104 U.S. 596, 601, 26, L.Ed. 846, 848;

Missouri, K & T Trust Co. v. Krumseig, 172 U.S. 351, 358-359, 19 S.Ct. 179, 182.

3.) Constructive trusts which arise in connection with a contract where the contract was executed in the state and the actions of the parties relied upon to establish the constructive trust occurred within the state.

Grand Trunk Western R. Co. v. Chicago W. Ind. R. Co., 131 F.2d 215, 217.

4.) Actions for specific performance of an oral contract to make reciprocal wills.

McCabe v. Bagby, 186 F.2d 546, 548-550.

5.) A contract to make provision by will if valid under state law.

In Re Simons, 247 U.S. 231, 239, 38 S.Ct. 497.

6.) The validity and obligatory character of a contract made and performed within a state.

Commissioner of Int. Rev. v. Thomas Flexible Coupling Co., 198 F.2d 350, 353;

Gaston, Williams & Wigmore v. Warner, 260 U.S. 201, 203-204, 43 S.Ct. 18, 19.

7.) A determination respecting distribution of a trust estate and adjudicating rights of beneficiaries.

See *Freuler v. Helvering*, 291 U.S. 35, 45, 54 S. Ct. 308, 312, wherein the Court held that a decree of the California court having jurisdiction of a trust, making determinations as to deductions for depreciation, and requiring restitution of distributions made on the

strength thereof, was binding with respect to tax questions relating thereto, and the Court stated:

> "Moreover, the decision of that court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is nonetheless a declaration of the law of the state because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law announced by that court adjudges distributable is, we think, to be so considered in applying section 219 of the Revenue Act of 1921."

B. The Determination of the Within Case Was Based Solely on Well Established California Law.

1. Agreements to make particular testamentary disposition of property are valid and enforceable in California. As stated by the California Supreme Court in *Redke v. Silvertrust, supra,* 100-101; App. A, pp. 3-4:

> "In general, a contract to make a particular testamentary disposition of property is valid and enforceable. As in every contract, 'there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. (Citations.) Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed.' (*Brown v. Superior Court,* 34 Cal.2d 559, 564-565; *Brewer v. Simpson,* 53 Cal.2d 567, 588-589.) If the contract is executed between spouses, a failure to perform it constitutes a vio-

lation of their confidential relationship and is constructive fraud which justifies the imposition of a constructive trust. (*Day v. Greene*, 59 Cal.2d 404, 411.)"

See also:

Monarco v. LoGreco, 35 Cal.2d 621, 623.

2. Under California law, if a contract can be performed legally, it will be presumed that the parties intended a lawful mode of performance.

Redke v. Silvertrust, supra, p. 102; App. A, pp. 6-7;

West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 759.

3. In California, questions of "intent" and "purpose" are questions of fact to be determined by the trial court.

Redke v. Silvertrust, supra, p. 102; App. A, p. 8;

Platt v. Wells Fargo Bank, 222 Cal.App.2d 658, 664-665.

The California Supreme Court applied these well established rules to reach its decision that the oral agreement between Ann and Sam was in all respects legal, valid and enforceable. *No federal question or law was involved or necessary for the decision.*

C. The Questions Presented by Petitioners Have Been Considered and Fully Answered by the State Court.

Petitioners' primary contention that the agreement, because it tends to promote tax evasion, is against public policy, and hence is unenforceable, has been vigorously argued before the California Supreme Court,

which fully considered the question and properly answered it as follows:

". . . As a general rule, if a contract can be performed legally, a court will presume that the parties intended a lawful mode of performance. (*West Covina Enterprises, Inc. v. Chalmers,* 49 Cal.2d 754, 759 [322 P.2d 13].) Therefore, unless Ann and Sam entered into their agreement with the intent of fraudulently concealing its existence from the federal government for the purpose of obtaining the marital deduction, that agreement would be valid and enforceable. (*Platt v. Wells Fargo Bank, supra,* 222 Cal.App.2d 658, 664.

"As noted in *Platt v. Wells Fargo Bank, supra,* 222 Cal.App.2d 658, 664, questions of 'intent' and 'purpose' are ordinarily questions of fact to be determined by the trial court. The trial court's findings regarding Ann's intent and state of mind are amply supported by the evidence, including the fact that it was Sam who counseled her not to change her will and trust, that Ann was in poor health during the period in question and had little knowledge of business transactions or tax laws, and that Ann entrusted Sam with the responsibility of managing her affairs . . ."

". . . We cannot so readily assume, however, that other persons will be induced to violate the tax laws in this manner, or that the taxing authorities will fail to discover their fraud.[2] Cases will be rare indeed wherein the promisee spouse will be willing to forego the security of a formal, written estate plan in reliance upon oral assurances by the promisor spouse, solely to gain pos-

sible tax benefits at death. Moreover, we doubt that those few persons so inclined to commit tax fraud would be deterred from doing so by a ruling that such an agreement would be unenforceable, for if the agreement is carried out in accordance with its terms, the issue of enforceability would never be raised or litigated. *We conclude that in the absence of fraudulent intent by the promisee spouse, an oral agreement to make a testamentary disposition of the nature involved herein is not void or unenforceable as against public policy. . . .*"

(*Redke v. Silvertrust, supra*, pp. 102-104; App. A, pp. 6-9; Emphasis added.)

"2. It should be noted that there is no limitations period on actions by federal taxing authorities to assess or collect a tax in cases involving fraudulent or willful attempt to evade taxes. (26 U.S.C. §6501, subd. (c).)"

As petitioners themselves have so aptly stated, "The tax laws are administered generally on the basis of a full and truthful disclosure by taxpayers." (Pet. p. 16.) The California Supreme Court pointed out that had Sam Hayden followed the course of "full and truthful disclosure" all he had to do was to disclose the existence of the oral agreement, and allow the taxing authorities to determine its effect. (*Redke v. Silvertrust, supra*, p. 102; App. A, p. 6.) Also, that court has retained continuing jurisdiction, including matters of adjustment, if the taxing authorities attempt to impose penalties. (*Redke v. Silvertrust, supra*, pp. 107-108; App. A, pp. 14-15.)

D. The Cases Relied Upon by Petitioners Are Inapplicable to the Instant Case.

1. On page 14 of the Petition, petitioners argue that the marital deduction is permissible only if the surviving spouse receiving the property has an unlimited power of appointment relying upon U.S. Treas. Estate Tax Reg. §2056(b)-(5)(g)(2) and *Batterton v. United States*, 406 F.2d 247 (5th Cir. 1968). However in spite of the cited authorities, we point out that there have been tax rulings and cases which upheld the marital deduction even though the surviving spouse's power to appoint or right to devise is severely limited. For example:

In *First Nat'l Bank of Janesville v. Nelson* (7th Cir. 1966), 355 F.2d 546, 17 AFTR 2d 1338, the court upheld a marital deduction taken under a will even though there was an antenuptial agreement, which might otherwise have destroyed the deduction, because the antenuptial agreement was not incorporated into the will. The dissenting opinion (p. 548) did hold the antenuptial agreement imposed a life estate in the nature of a trust, defeating the marital deduction.

Thus, in a case which determined the specific tax question involved here, there was a division of opinion as to whether or not the antenuptial agreement defeated the marital deduction. *The majority opinion held that even though such limiting agreement exists, if it was not actually incorporated in the will it did not have the effect of defeating the marital deduction, although fully disclosed.*

Batterton v. United States, supra, is readily distinguishable from *Janesville.* In *Batterton* under the applicable state law, the side agreement was actually incorporated into the will and limited the power of appointment. In *Janesville, as in the instant case,* there was no such incorporation by reference.

We make reference to the foregoing to emphasize the point that there is an appropriate forum in which to litigate the tax problems and the effect of the oral agreement upon the tax problems with respect to the property involved. (See *Redke v. Silvertrust, supra,* pp. 105 and 107; App. A, pp. 11 and 14-15.)

See also: *Dekker v. United States,* (1965 D.C.S.D. Ill.) 245 F. Supp. 255. In this case the husband and wife executed joint and mutual wills creating a life estate in the survivor and providing that upon the death of the survivor, there would be a gift over to their children—*marital deduction upheld.*

Revenue Ruling 71-51 IRB 1971-5 p. 15 [Prentice-Hall Fed. Estate and Gift Tax Service §142,357]. Jointly owned property and life insurance proceeds passing to surviving wife on death of her husband *qualified for the marital deduction,* despite the fact that they had entered into a joint will under the contractual provisions of which the wife's fee interest in the property was reduced to a life estate with remainder interest passing to the children.

2. Petitioners state (Pet. p. 17) that the decision of the California Supreme Court is based upon *Platt v. Wells Fargo Bank, supra.* This court denied a Petition for Writ of Certiorari in that case, 377 U.S. 965 (1964). Nevertheless, petitioners argue that the holding in *Platt* is contrary to numerous federal cases de-

claring agreements unenforceable without regard to good faith or fraudulent intent. However, the cases cited and relied upon by petitioners to support this argument on pages 18-20 of the Petition are not in point since they do not deal with *legal* contracts similar to the agreement between Ann and Sam. On the contrary, each of the cited cases deals with either (a) a situation where there was a direct violation of law inherent in the agreement,[4] or (b) one where the purpose of the agreement was unlawful or the agreement could not be performed in a legal manner.[5] In the instant case, there was no direct violation of law inherent in the agreement between Ann and Sam, and it had no unlawful purpose. The trial court found the agreement to be in all respects legal and did not require the parties to do anything illegal in performing it [1 C.T. p. 181; Pet. App. C, pp. 49-50], and the California Supreme Court unanimously affirmed the same, basing its decision solely on local law.

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[4] *Weitzel v. Brown-Neil Corporation*, 152 F. Supp. 540 (N.D.W.Va. 1957), affd. 251 F. 2d 611 (4th Cir. 1958); *Warner Bros Theatres v. Cooper Foundation*, 189 F. 2d 925 (10th Cir. 1951); *Pennsylvania Water & Power Co. v. Consolidated Gas Electric Light and Power Co.*, 97 F.Supp. 952 (D.C. Md. 1951), affd. 194 F. 2d 89 (4th Cir. 1952); *LeJohn Manufacturing Company v. Webb*, 222 F. 2d 48 (D.C. Cir. 1955); *Weil v. Neary*, 272 (Sic; 278) U.S. 160 (1929).

[5] *Colonell v. Goodman*, 78 F. Supp. 945 (E.D. Pa. 1948); *Northwest Airlines, Inc. v. Alaska Airlines, Inc.*, 351 F. 2d 253 (9th Cir. 1965); *Providence Tool Co. v. Norris*, 69 U.S. 45 (1865); *Marshall v. The Baltimore and Ohio Railroad Co.*, 57 U.S. 314 (1853); *Hazelton v. Sheckels*, 202 U.S. 71 (1906); *Noonan v. Gilbert*, 68 F. 2d 775 (D.C.Cir. 1934); *McMullen v. Hoffman*, 174 U.S. 639 (1899).

E. The Federal Question Asserted Is Not Substantial, Lacks Color of Merit, and the Petition for Writ of Certiorari Should Be Denied.

On appeal from the highest court of the state or on a Petition for Writ of Certiorari, where the federal question asserted is not substantial and lacks color of merit, the appeal should be dismissed or the Petition for Writ of Certiorari should be denied.

New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 343-346, 22 S.Ct. 691, 693-694;

Black v. Cutter Laboratories, 351 U.S. 292, 299-300, 76 S.Ct. 824, 828.

VII.

CONCLUSION.

Having demonstrated that there is no substantial federal question involved herein and that the case was determined solely on local California law, we respectfully submit that the Petition for Writ of Certiorari is wholly without merit, and should be denied.

Respectfully submitted,

CLARENCE S. HUNT,
Attorney for Respondent.

SAMUEL REISMAN,
Attorney for Respondent.

APPENDIX A.

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

Mitzi Lee Redke, Plaintiff and Respondent, v. Abraham Silvertrust et al., Defendants and Appellants. L.A. 29886, Super. Ct. 873203.

Filed: Nov. 24, 1971.

Plaintiff Mitzi Lee Redke brought an action in Los Angeles Superior Court to enforce the terms of an oral agreement allegedly made for her benefit between her mother, Ann Hayden, and her stepfather, Samuel Hayden, both of whom are new [sic] deceased, whereunder Sam agreed to bequeath certain of Ann's separate property to Mitzi. Defendants, who are the executors of Sam's estate, co-trustees of a trust created by him, and testamentary trustees under Ann's will, appeal from a judgment in Mitzi's favor. We have concluded that, except for one minor modification, the judgment should be affirmed.

The pertinent facts underlying the dispute are as follows: In 1955, Sam, a widower with three adult children, married Ann, mother of Mitzi and Warren. By 1963, Ann's separate property had grown from approximately $20,000-$40,000 to over a million dollars, largely a result of Sam's assistance in managing her investments. Ann executed a will and an inter vivos trust which provided that half of her separate property would be placed in a marital deduction trust for Sam, giving him a general power of appointment over that property; the remaining half was to be placed in trust

for her children, Mitzi and Warren. Sam executed a similar will and trust leaving half of his property to Ann, and half in trust for Mitzi and Warren.

On February 22, 1963, Warren died unexpectedly from a heart attack. Ann, who was suffering from terminal cancer, was informed of her son's death the following day. That news was a shock to Ann, and she immediately became concerned about providing for Mitzi, whose husband was also ill. Consequently, she informed Sam, in the presence of her nurse, Mitzi and another person, that she wanted to call her lawyers to change her will and trust to leave all of her separate property to Mitzi. Sam assured her that no such changes were necessary, and promised that if Ann died, Sam would leave his share of Ann's property to Mitzi upon his own death and would see that Mitzi received all of Ann's property. Ann agreed. Thereafter, the only substantial changes made in Ann or Sam's estate plans prior to Ann's death were amendments to their trusts to give Warren's share of their trust estates to Mitzi; Ann also executed a document transferring to her trust most of her remaining property.

Ann died on April 5, 1963. On the following day, Sam offered to give to Mitzi Ann's jewelry and furs, a matter discussed separately below. Sam also reaffirmed to various persons, including Mitzi, his promise to leave Mitzi his share of Ann's property. Nevertheless, within a few months following Ann's death, Sam met and married Ruth Allender and shortly thereafter amended his trust and will eliminating all provision for Mitzi and naming as beneficiaries his new wife and his natural children. Sam died in 1965, and Mitzi filed creditor's claims against his estate based upon the oral agreement and the separate gift of furs and jewelry.

At trial, defendants denied the existence of the alleged oral agreement and contended, among other things, that such an agreement would be unenforceable under the statute of frauds and void as contrary to public policy, being an illegal evasion of federal and state death taxes. The trial court made extensive findings which, in effect, recognized the existence of the oral agreement and upheld its validity and enforceability. The court held that upon Ann's death Sam became constructive trustee for the benefit of Mitzi of all of Ann's separate property, furs and jewelry received by Sam from and after Ann's death, together with all income, interest and profits derived therefrom. The court's judgment ordered defendants to deliver to Mitzi certain designated stock valued at $392,186.48, with dividends and increments thereto, plus seven percent interest from the date of judgment. In addition to this stock, Mitzi was awarded the sum of $457,916.06, plus seven percent interest from the date of judgment. Mitzi also obtained judgment for all damages which she or Ann's estate may incur by reason of Sam's negligence or misconduct.

1. *The Oral Agreement*

In general, a contract to make a particular testamentary disposition of property is valid and enforceable. As in every contract, "there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. [Citations.] Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed."

(Brown v. Superior Court, 34 Cal.2d 559, 564-565; Brewer v. Simpson, 53 Cal.2d 567, 588-589.) If the contract is executed between spouses, a failure to perform it constitutes a violation of their confidential relationship and is constructive fraud which justifies the imposition of a constructive trust. (Day v. Greene, 59 Cal.2d 404, 411.)

The trial court correctly determined that the statute of frauds did not render the agreement unenforceable. "Although the statute requires that an agreement to make a provision by will be in writing (Civ. Code, § 1624, subd. 6; Code Civ. Proc., § 1973, subd. 6) a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract [citation]. The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute [Citation.]" (Day v. Greene, *supra*; 59 Cal.2d 404, 409-410; see Monarco v. Lo Greco, 35 Cal.2d 621, 623; Notten v. Mensing, 3 Cal.2d 469, 474; Mintz v. Rowitz, 13 Cal.App.3d 216, 223-225.)

The trial court found that Ann, by reason of her trust and confidence in Sam, and in reliance upon his oral promise, changed her position to her detriment, and to Mitzi's detriment, by not changing her will and trust to make Mitzi her sole beneficiary; she changed her position by maintaining the status quo despite her concern over her daughter's welfare. Defendants do not question the evidentiary support for this finding, nor do they dispute the applicable law set forth above.

They do, however, contend that Sam and Ann subsequently abandoned the agreement, a factual question which the trial court resolved in plaintiff's favor. There was ample evidence to support the court's finding that the agreement was not abandoned, including the fact that after Ann's death, Sam affirmed to five witnesses, including Mitzi, his agreement to leave his share of Ann's property to Mitzi.[1] We conclude that the trial court correctly held that defendants are estopped to rely upon the statute of frauds.

Defendants' primary contention is that the agreement between Ann and Sam was illegal and against public policy as an attempted evasion of death taxes. By the terms of Ann's will and trust, Sam was given half of Ann's separate property for life, with an unlimited power to appoint the remainder. One of the purposes of framing Ann's estate plan in this manner was to take advantage of the tax benefits afforded by the federal marital deduction (26 U.S.C. § 2056) whereby death taxes may be lawfully avoided as to one half of a spouse's separate property. The federal deduction is only available, however, if the surviving spouse is given the unrestricted right to dispose of the property as he chooses. Any limitation upon that right

[1]Defendants also point out that the trial court found that Sam's promise was *conditioned* upon Ann's agreement not to change her will and trust, and that the court also found that Ann in fact did change her trust by eliminating therefrom all provision for Warren. Defendants urge us to hold that Ann thereby breached her part of the agreement, relieving Sam from his obligations thereunder. The contention is wholly without merit. The essence of Ann's agreement, as found by the trial court, was that in consideration of Sam's promise, Ann would not change her will and trust *to leave her property to Mitzi rather than Sam.* Ann fully performed that agreement, and the fact that she modified her trust, following Warren's death, to eliminate his share was wholly consistent with, and not in breach of, the oral agreement.

could result in the loss of the deduction. Thus, "if the surviving spouse entered into a binding agreement with the decedent to exercise the power [of appointment] only in favor of their issue, the condition [i.e., that the surviving spouse be given an unrestricted right of disposition] is not met." (Fed. Tax Reg. (1971) § 20.-2056(b)-5(g)(2); see Batterson (sic) v. United States, 406 F.2d 247.)

The evidence discloses that following Ann's death, Sam, as executor of her estate, claimed the marital deduction, obtaining a substantial tax savings. It is likely that had the existence of the oral agreement restricting Sam's right to dispose of Ann's property been disclosed to the taxing authorities, the deduction would have been disallowed. Defendants contend, therefore, that the agreement constituted a fraud upon the tax authorities and should not be enforced.

Since any willful attempt to evade or defeat taxes is a crime (26 U.S.C. § 7201), had Ann and Sam entered into their agreement with the intent of fraudulently concealing its existence from the tax authorities for the purpose of improperly obtaining the marital deduction, it is likely that we would hold the agreement unenforceable. (See Platt v. Wells Fargo Bank, 222 Cal.App.2d 658, 661.) However, having failed to prove such an intent at trial, defendants cannot prevail.

There was, of course, nothing illegal per se in Sam's oral agreement to leave to Mitzi Sam's share of Ann's separate property, for that agreement could have been carried out in an entirely legal manner had Sam disclosed its existence to the tax authorities, or chosen not to claim the marital deduction. As a general rule, if a contract can be performed legally, a court will presume that the parties intended a lawful mode of perform-

ance. (West Covina Enterprises, Inc. v. Chalmers, 49 Cal.2d 754, 759.) Therefore, unless Ann and Sam entered into their agreement with the intent of fraudulently concealing its existence from the federal government for the purpose of obtaining the marital deduction, that agreement would be valid and enforceable. (Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 664.)

The trial court found that Ann was a housewife with little familiarity with business transactions, that Sam was the dominant influence in managing their legal and financial affairs, that Ann had no part in choosing the method by which Sam would carry out his promise to provide for Mitzi, that after the oral agreement was made, Ann (suffering from terminal cancer) had no concern with the tax consequences of that agreement and had no reason to suspect that Sam would proceed illegally in carrying it out, and that "Notwithstanding any explanations that may have been offered to her, it is doubtful that Ann had any particular or clear comprehension or understanding at any time of the technical aspects" of a marital deduction, or an unlimited power of appointment, or the tax laws pertaining thereto.

Defendants point to evidence that after the oral agreement was made, Ann failed to disclose its existence to her attorneys and tax advisers, despite the fact that she did discuss and make certain other changes in her estate plan and had been previously advised that in order to preserve the marital deduction Sam must be given an unrestricted power to appoint half her separate property to whomever he chooses. Defendants would infer from this evidence that Ann intentionally concealed the agreement for the purpose of defrauding the tax authorities.

As noted in Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 664, questions of "intent" and "purpose" are ordinarily questions of fact to be determined by the trial court. The trial court's findings regarding Ann's intent and state of mind are amply supported by the evidence, including the fact that it was Sam who counseled her not to change her will and trust, that Ann was in poor health during the period in question and had little knowledge of business transactions or tax laws, and that Ann entrusted Sam with the responsibility of managing her affairs. It is true that the evidence cited by defendants could have raised an inference that Ann concealed the oral agreement from her attorneys in order to gain tax benefits for her estate. A contrary inference could have been drawn, however, that Ann, in the suffering of her last days, either innocently forgot to mention the agreement or simply failed to appreciate its significance from a tax standpoint.

The evidence of Sam's intent is less clear, although it is undisputed that following Ann's death, as executor, he did claim the marital deduction for Ann's estate without disclosing to the tax authorities the existence of his agreement with Ann. However, even if we assume that Sam acted fraudulently in concealing the agreement, defendants may not rely upon his fraud as a shield against Mitzi's claim for breach of that agreement. As we noted in Tri-Q, Inc. v. Sta-Hi Corp., 63 Cal.2d 199, 219, quoting from 6A Corbin on Contracts, section 1518, page 744, "A bargain may be illegal by reason of the wrongful purpose of one or both of the parties making it. This is true even though the performances bargained for are not in themselves illegal and even though in the absence of the illegal

purpose the bargain would be valid and enforceable. A party who makes such a bargain in furtherance of his wrongful purpose can not enforce it, *even though it is enforceable against him by the other party if the latter is innocent of such a purpose.*" (Italics in original.)

Defendants also urge that regardless of Sam or Ann's intent, all such oral agreements should be declared void as against public policy, in order to deter others from attempting to evade death taxes by such a device. We cannot so readily assume, however, that other persons will be induced to violate the tax laws in this manner, or that the taxing authorities will fail to discover their fraud.[2] Cases will be rare indeed wherein the promisee spouse will be willing to forego the security of a formal, written estate plan in reliance upon oral assurances by the promisor spouse, solely to gain possible tax benefits at death. Moreover, we doubt that those few persons so inclined to commit tax fraud would be deterred from doing so by a ruling that such an agreement would be unenforceable, for if the agreement is carried out in accordance with its terms, the issue of enforceability would never be raised or litigated. We conclude that in the absence of fraudulent intent by the promisee spouse, an oral agreement to make a testamentary disposition of the nature involved herein is not void or unenforceable as against public policy. Accordingly, that portion of the trial court's judgment which upheld Mitzi's right to enforce Sam and Ann's oral agreement should be affirmed.

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[2]It should be noted that there is no limitations period on actions by federal taxing authorities to assess or collect a tax in cases involving fraudulent or willful attempts to evade taxes. (26 U.S.C. § 6501, subd. (c).)

2. *The Gift of Ann's Jewelry and Furs*

As an alternative theory for recovery of Ann's jewelry and furs, Mitzi contended (and the trial court found) that after Ann's death Sam gave these items to Mitzi, and subsequently agreed to repurchase them from her and to deposit the proceeds in her trust. Defendants contend, however, that the gift was incomplete, since Sam retained possession of most of the jewelry and furs rather than delivering them to Mitzi. (See Gordon v. Barr, 13 Cal.2d 596, 601-602; Blonde v. Estate of Jenkins, 131 Cal.App.2d 682, 686.) Nevertheless, as we have pointed out, Mitzi had an enforceable claim to Ann's jewelry and furs by reason of the oral agreement in her favor. Therefore, whether Sam in fact "gave" these items to Mitzi is irrelevant; he had already agreed with Ann to transfer them to Mitzi at his death, and he subsequently agreed with Mitzi to purchase them from her and to deposit the proceeds in her trust. Accordingly, the trial court properly awarded to Mitzi the fair market value of Ann's jewelry and furs, i.e., $76,800 as of the date of Sam's death.

Defendants contend that Mitzi should be bound by the valuation of the jewelry and furs set forth in the decree of distribution in Ann's estate, i.e., $37,915. However, since Sam's promise was to transfer these items to Mitzi at his death, their value at the time of *Ann's* death was not relevant. Moreover, most of the difference between the two valuation figures is represented by a $28,000 diamond ring belonging to Ann but inadvertently omitted from the decree of distribution in Ann's estate. Mitzi had no reason to question the accuracy of that decree, trusting in Sam to carry out his promise and transfer *all* of Ann's property to her. Accordingly, it would be inequitable to hold Mitzi

bound by the valuation and inventory of assets set forth in the decree in Ann's estate. The judgment of the trial court awarding to Mitzi the fair market value of Ann's jewelry and furs as of the date of Sam's death should be affirmed.

3. *Miscellaneous Questions*

a. *Liability for death taxes*

Defendants assert that since the trial court's judgment is silent concerning Mitzi's liability for death taxes on the money and property awarded to her, that judgment will have the effect of relieving Mitzi from death taxes to the detriment of Sam's heirs and estate. Without passing on the question of the parties' respective tax liability, it seems apparent that this question was neither presented to, nor litigated by, the trial court. If Mitzi in fact owes taxes on her share of Ann's property or is obligated to reimburse Sam's heirs or estate for taxes previously paid on property thereafter awarded to her, such matters may be determined in separate proceedings. (See Platt v. Wells Fargo Bank, *supra*, 222 Cal.App.2d 658, 670.) Moreover, we note that the trial court has retained jurisdiction to make such further orders between the parties as may be proper, and perhaps the court will agree to entertain the tax matter raised by defendants.

b. *Interest on money judgment*

The trial court awarded to Mitzi the fair market value of Ann's jewelry and furs and her interest in the home and furnishings, together with seven percent interest on those amounts from the date of Sam's death. Defendants maintain that since the value of the foregoing property was in dispute throughout the trial,

Mitzi's damages were unliquidated and an award of prejudgment interest was improper. (See former Code Civ. Proc., § 3287; Caplan v. Schroeder, 56 Cal.2d 515, 521.) As Mitzi points out, however, her cause of action was not based upon simple breach of contract but arose out of Sam's violation of his confidential relationship with Ann by his failure to perform his part of their agreement after having benefited from Ann's performance. "Such a violation of a confidential relationship constitutes constructive fraud and where, as here, unjust enrichment results a constructive trust may be imposed. [Citations.]". (Day v. Green, *supra*, 59 Cal.2d 404, 411.)

Since Mitzi has proceeded on the theory of constructive fraud, she is entitled to the benefit of Civil Code section 3288, which provides that "In an action for breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." Under the cases, the trial court may award prejudgment interest under section 3288 whether or not plaintiff's damages are "liquidated." (See Estate of Piercy, 168 Cal. 755, 758; Tevis v. Beigel, 174 Cal.App.2d 90, 101; Katz v. Enos, 68 Cal.App.2d 266, 278-279; see also Civ. Code, § 2237; Bass v. Youngblood, 221 Cal. App.2d 278, 289; Nathanson v. Murphy, 147 Cal. App.2d 462, 466-467; Brunson v. Babb, 145 Cal.App. 2d 214, 230; West v. Stainback, 108 Cal.App.2d 806, 819.) Since Sam had promised to turn over Ann's property to Mitzi upon his death, and since his failure to do so constituted constructive fraud, the trial court had discretion under section 3288 to award Mitzi interest from the date upon which the fraud occurred.

c. *Interest on cash proceeds from sale of stock*

The trial court awarded Mitzi seven percent interest on certain of Ann's stock sold by Sam following her death; interest is to run from the date of sale, rather than the date of Sam's death. Defendants contend that Sam's obligations to Mitzi did not arise until his death, and that his estate should not be held liable for interest prior to that time. Defendants fail to appreciate, however, that upon *Ann's* death, Sam became constructive trustee of Ann's property, with an obligation to hold *all* of that property for Mitzi's benefit. Upon Sam's breach of the agreement, Mitzi was entitled to the benefit of those statutory provisions, such as Civil Code section 2237, which measure the liability of a defaulting trustee. (See McDaniel v. McDaniel, 275 Cal.App.2d 927, 944; Bank of America v. Ryan, 207 Cal.App.2d 698, 710.) Section 2237 obligates a trust (sic) who has wrongfully disposed of trust property to account for all profits so made, or the value of the use of the property "or to account for its proceeds with interest." Thus, the trial court properly awarded Mitzi interest, from the date of sale, upon the proceeeds of the stock Sam sold during his life.

d. *Interest upon stock retained by Sam*

The trial court awarded Mitzi all of Ann's stock retained by Sam, together with seven percent interest upon its fair market value, which interest is to run from the date of judgment until the date of delivery to Mitzi. Defendants correctly contend that interest may only be awarded on a *money* judgment, and not upon a judgment awarding stock or other personal property. (Estate of Neilson, 57 Cal.2d 733, 748-

749; Sullivan v. Wellborn, 32 Cal.2d 214, 219; Jones v. Sacramento Sav. & Loan Assn., 248 Cal.App.2d 522, 531; Chase v. Leiter, 96 Cal.App.2d 439, 459; Estate of Lockhart, 21 Cal.App.2d 574.) Plaintiff's theory is that the court's judgment was in effect a money judgment since it ordered defendants to deliver the stock to Mitzi within five days after entry of judgment or face a money judgment for the fair market value of the stock, computed according to various specified methods. However, defendants assert that in fact they did deliver the stock to the clerk of the court "shortly" after entry of judgment, and plaintiff does not contend that delivery was untimely. Under the circumstances, the trial court improperly imposed post-judgment interest upon the value of the stock so delivered.

e. *Indemnification provision*

Finally, defendants complain that the trial court erred in awarding Mitzi any future damages which she or Ann's estate may incur by reason of Sam's acts, and requiring defendants to indemnify her and Ann's estate from any such liability. Defendants claim that this portion of the judgment exceeds the issues litigated by the parties and adjudicates "conjectural and premature matters" not properly before the court. As we have seen, however, the record indicates that Sam, as executor of Ann's estate, may have wrongfully claimed the federal marital deduction by concealing the existence of the oral agreement. It is possible that by reason of his acts, the taxing authorities may attempt to impose penalties in the matter. Under such circumstances, the trial court, sitting in equity, had the power to "adjust all the differences between the parties arising from the cause of action in order to do complete justice and

prevent further litigation, whether or not the particular relief was requested." (Sears v. Rule, 27 Cal.2d 131, 149; see Coons v. Henry, 186 Cal.App.2d 512, 519.) The trial court herein did no more than determine that Mitzi should not share responsibility for Sam's acts, retaining jurisdiction to make such further orders as may be necessary to protect her interests in the event claims are filed against either her or Ann's estate, of which she was a principal beneficiary.

The judgment is modified by striking therefrom the award of postjudgment interest upon the stocks awarded to plaintiff. As so modified, the judgment is affirmed. Plaintiff shall receive her costs on appeal.

Burke, J.

We concur:

Wright, C. J.
McComb, J.
Peters, J.
Tobriner, J.
Mosk, J.
Sullivan, J.

Modification of Opinion.

In the Supreme Court of the State of California, in Bank.

Mitzi Lee Redke, Plaintiff and Respondent, v. Abraham Silvertrust et al., Defendants and Appellants. L.A. 29886. Super. Ct. 873203.

Filed: Dec. 29, 1971.

BY THE COURT:

The opinion herein, appearing at 6 Cal.3d 94, filed November 24, 1971, is hereby modified as follows:

(1) The last two sentences of the first full paragraph appearing on page 107 are deleted, and the following substituted:

"Plaintiff asserts that defendants failed to deliver the specified stocks to her within the five-day period, thereby converting the award of stock into a money judgment upon which post-judgment interest properly could be imposed. Defendants claim, however, that pursuant to a "gentlemen's agreement" with plaintiff's counsel, defendants acted as expeditiously as possible to comply with the judgment, and to deliver the stocks to the clerk of the court, that plaintiff never objected to the brief delay in depositing these stocks, and that defendants should be deemed to have substantially complied with the judgment in this respect.

"In view of the fact that resolution of the question involves matters occurring subsequent to the entry of judgment and lying outside the record, we think it appropriate that the trial court determine whether, in fact, defendants have complied with the judgment as it pertains to the delivery of the stock. As indicated above, however, in the event the trial court finds that

defendants did comply with its judgment, no post-judgment interest may be imposed upon the value of the stocks."

(2) The last paragraph appearing on page 108 is deleted, and the following substituted:

"The judgment is modified by striking therefrom the award of post-judgment interest upon any stocks found to have been delivered by defendants to plaintiff in compliance with the terms of the judgment. As so modifed, the judgment is affirmed and the cause is remanded to the Los Angeles County Superior Court for further proceedings not inconsistent with this opinion. Plaintiff shall receive her costs on appeal."

APPENDIX B.

Respondent's Brief, pages 29-42.

The Agreement Is Legal and Enforceable.

The Agreement is legal in all respects. The Agreement does not contemplate or require anything illegal in its performance. There is no violation of law involved in the Agreement nor does it have any unlawful purpose. The Agreement had nothing whatsoever to do with a "marital deduction", contrary to Appellants' arguments. (Br. p. 24.) The Agreement simply provided that in consideration of Ann not then and there changing her Will and Trust to provide that all of her property, furs and jewels would go to Mitzi, Samuel agreed on his death to leave all of Ann's property, furs and jewels to Mitzi. *The Agreement was entirely silent upon, and made no mention of, the manner in which Samuel was to carry out his promise, and the so-called "marital deduction" or Samuel's power of appointment was never mentioned, nor involved.*

In addition to finding that the Agreement was made, the trial court also found and concluded:

> ". . . Ann did not at any time have any reason to suspect that her husband would do anything illegal or irregular in the method he would choose to carry out the said agreement to give all of her property, jewels and furs to Mitzi. If Sam, in performing the oral agreement with Ann, intended to or did act contrary to any legal technicalities, Ann had no knowledge thereof or responsibility therefor. Ann acted in good faith at all times. The foregoing facts lulled Ann into relying upon Sam's oral agreement. Ann did not at any time, purposely or otherwise, conceal from anyone the existence of her oral agreement made on February

23, 1963, with Sam for Mitzi's benefit. . . . *From and after February 23, 1963, when Ann made her aforesaid oral agreement with Sam for Mitzi's benefit, Ann was not concerned with the tax consequences thereof.*" [1 C.T. p. 156, lines 6-21; italics ours.]

"The aforesaid mutual oral agreement between Ann and Sam for Mitzi's benefit was in all respects clear, certain, unambiguous and *legal and did not require any of the parties to do anything illegal in performing it.*" [1 C.T. p. 181, lines 7-11; italics ours.]

"Ann acted in good faith at all times and entered into said mutual oral agreement with Sam in good faith and in reliance upon Sam's honesty and integrity and if Sam, in performing said oral agreement, intended to or did act contrary to any legal technicalities, Ann has (had) no knowledge thereof and was not *in pari delicto* with Sam." [1 C.T. p. 181, lines 15-21.]

The foregoing Findings and Conclusions are amply supported by the testimony of the witnesses to the making of the 'Agreement, *i.e.*, Mitzi and Mary, and by the testimony of the witnesses to Samuel's subsequent reaffirmation of the Agreement, *i.e.*, Mitzi, Lillian Small, Phil Malkin, Elaine Benedict and Stanley. (See Footnote 2, *supra.*) *Never at any time in any of the testimony concerning the Agreement was there one scintilla of evidence to indicate or infer that there was anything illegal about the Agreement or that the Agreement required any of the parties to do anything illegal in performing it. Samuel merely had to will Ann's property to Mitzi. Actually, neither Ann nor*

Samuel did anything illegal in performing the Agreement. When Ann died on April 5, 1963, Samuel had already partially performed the Agreement by giving Mitzi $100,000 of Ann's money on March 29, 1963. Again, immediately after Ann's death, Samuel partially performed the Agreement by giving Mitzi her mother's furs and jewels. It was not until *after* Samuel met his third wife, Ruth, and decided to breach the Agreement and violate his promise to Ann, that he *wrongfully* took advantage of the marital deduction *for his own gain* on July 6, 1964, when he filed the Estate Tax Return for Ann's Estate. [Ex. 114.] In so doing, Samuel did not take the marital deduction in the *performance* of the Agreement, *but rather in furtherance of his own wrongful conduct in breaching the Agreement* and attempting to usurp and keep Ann's separate property for himself and his heirs. The Agreement did not contemplate or require anything illegal in its performance.

1. Agreements Binding a Party to Make a Particular Disposition of His Property by Will Are Valid in California, and the Statute of Frauds Does Not Render an Oral Agreement to Make a Will Unenforceable Where a Party Has Been Induced to Make a Serious Change in Position in Reliance on the Oral Agreement.

In California, it has long been the rule that a party may make a valid agreement binding himself *legally* to make a particular disposition of his property by will. Although the provisions of Civil Code Section 1624(6) and Code of Civil Procedure Section 1973(6) require such an agreement to be in writing, the California courts have consistently held that a party will be estopped from relying upon the Statute where fraud would result

from refusal to enforce an oral contract. As stated in *Day v. Greene*, 59 Cal. 2d 404 at 409:

> "We are of the view that the trial court correctly determined that the statute of frauds did not render the agreement unenforceable. Although the statute requires that an agreement to make a provision by will be in writing (Civ. Code Sec. 1624, subd. 6; Code Civ. Proc., Sec. 1973, subd. 6), a party will be estopped from relying on the statute where fraud would result from refusal to enforce an oral contract. . . . The doctrine of estoppel has been applied where an unconscionable injury would result from denying enforcement after one party has been induced to make a serious change of position in reliance on the contract or where unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to invoke the statute. . . . As we have seen, both these grounds of estoppel were found to be present here."

See also:

Brewer v. Simpson, 53 Cal. 2d 567, 588, *et seq.*;
Monarco v. Lo Greco, 35 Cal.2d 621, 623;
Brown v. Superior Court, 34 Cal.2d 559, 563;
Porporato v. Devincenzi, 261 Cal.App.2d 670, 674;
Goldstein v. Hoffman, 213 Cal.App.2d 803, 811.

In accordance with the foregoing cases, and based upon the evidence; the trial court found that there existed a binding oral agreement between Ann and Samuel whereby Samuel agreed that on his death he would leave all of Ann's property, furs and jewels to Mitzi. *The method or means by which Samuel would carry*

out his promise was never discussed and does not form a part of the Agreement. The mere fact that Ann's *previous* testamentary plans contained provisions for marital deduction trusts in favor of Samuel and gave Samuel an unrestricted power of appointment is *entirely immaterial and beside the point, since they were superseded by and are not a part of the Agreement.* Therefore, they can have absolutely no effect on the subsequent Agreement made between Ann and Samuel. Since the Agreement was conclusively established by the great weight of the evidence below, the Appellants were forced to cast about for some other defense, and in so doing, *have improperly sought to tie this conceded Agreement back to Ann's previous testamentary plans* which contained the so-called "marital deduction" trust in favor of Samuel and gave Samuel an unrestricted power of appointment.

However, the fallacy in such reasoning is readily apparent. Appellants seek to create an entirely new and different agreement pronounce it illegal, and ignore the actual Agreement of the parties as found by the court below.

The Agreement was independent of, and not conditioned upon any of the terms or provisions of Ann's prior testamentary plans which she intended to immediately change. As found by the trial court, *except for Samuel's promise to leave all of her property to Mitzi, Ann would have immediately changed her Will and Trust to eliminate Samuel and leave all her property to Mitzi* [1 C.T. p. 155, lines 8-16], *and thus eliminate the marital deduction trust entirely.* To perform the Agreement, it was only necessary for Samuel to simply will all of Ann's separate property,

furs and jewels to Mitzi, without any further ado, as he had agreed. *This required no illegal act.*

However, as the evidence disclosed, Samuel refused to carry out his promise and breached his Agreement with Ann within a very short time after he met his third wife, Ruth. Once having determined that he was going to breach the Agreement and remain silent in connection therewith, he then proceeded in furtherance of his breach to improperly take advantage of, and claim the marital deduction provided in Ann's previous testamentary plans and to wrongfully exercise the power of appointment in favor of his own *inter vivos* (sic) (Sam Trust #1), which he had amended to eliminate Mitzi as a beneficiary and make his third wife, Ruth, and two of his children by his first wife the recipients and beneficiaries of Ann's separate property which rightfully belonged to Mitzi. *All of this was directly contrary to Ann's desires and intentions and violated Samuel's promise to her to leave her separate property to Mitzi and consituted a direct fraud upon Ann and Mitzi.* The trial court has, by its Findings, Conclusions and Judgment rendered herein, rectified this *unconscionable wrong.*

There was nothing inherent in the Agreement that was against public policy. There was no direct violation of law inherent in the Agreement, and the Agreement had no unlawful purpose. Indeed, as aforesaid, the courts in California have consistently enforced such agreements, and we refer to *Day v. Greene, supra,* as an outstanding example thereof. The cases cited by Appellants on pages 24-30 and 31 and 32 of the Brief are entirely beside the point and can have no application to the *instant* case. Each of the cited cases deals with either (a) a situation where there was *a direct*

violation of law inherent in the agreement, or (b) one where the *purpose of the agreement was unlawful* and the agreement could *not* be performed in a *lawful* manner. *The Agreement does not come within either of these two categories.*

2. The Agreement Did Not Contemplate Any Evasion of Death Taxes.

In the Brief, pages 31-42, Appellants again attempt to improperly engraft upon the Agreement the provisions in Ann's *previous* testamentary plans providing the "marital deduction" trust for Samuel. As we have demonstrated, the provisions in Ann's previous testamentary plans had nothing whatsoever to do with the *subsequent* Agreement. Notwithstanding this fact, the Appellants mistakenly argue that, "If Ann intended to conceal the oral agreement for the purpose of obtaining the marital deduction, the agreement is illegal and unenforceable." (Br. p. 33.) However, Appellants have not cited a single bit of *affirmative* evidence to support this contention, but merely rely upon *Platt v. Wells Fargo Bank*, 222 Cal. App. 2d 658. The facts in *Platt* are entirely *different* from the facts herein. In *Platt* the parties specifically entered into an agreement to obtain the marital deduction. *In the instant case, there was no such agreement.* The Agreement merely required Samuel to leave all of Ann's separate property, furs and jewels to Mitzi. The Agreement had nothing whatsoever to do with claiming a marital deduction or limiting any so-called unrestricted power of appointment. In fact, the court found that from and after February 23, 1963, when Ann made the Agreement with Samuel for Mitzi's benefit, Ann was not concerned with the tax consequences thereof. [1

C.T. 156, lines 18-21.] Nothing was said about the method of performing the Agreement. No illegality was required or intended and the trial court so found and concluded. [1 C.T. p. 156, lines 4-12; p. 181, lines 7-11.]

Indeed, the court found that throughout her lifetime, Ann was merely a housewife with little more than housewife experience. Ann had not engaged in and had little familiarity with business transactions. [1 C.T. p. 151, lines 1-3.] *Silvertrust,* Samuel's trusted tax advisor and confidant, *testified that Ann had no knowledge of tax laws,* to wit:

> "A. (sic) And in connection with Mrs. Hayden's business transactions, I believe you previously testified in your deposition that Mrs. Hayden was not a business woman; is that right?
>
> A. That's right.
>
> Q. *And I believe you said that Mrs. Ann Hayden was an average housewife without any business activity and no knowledge of tax laws: is that right?*
>
> A. *I think so, yes.*" [5 R.T. p. 1298, lines 12-20; emphasis ours.]

Appellants have not controverted the following Findings:

(a) That at all times during the marriage between Ann and Samuel, Samuel was the dominant personality and exercised dominant influence in the management of all of their business and legal affairs [1 C.T. p. 150, lines 27-31];

(b) That Samuel was capable of, and skilled in, manipulating both his and Ann's business affairs, and

availed himself of every method for the avoidance of tax consequences and to accomplish estate tax savings [1 C.T. p. 151, lines 18-21];

(c) As husband and wife, there existed a confidential and fiduciary relationship between Ann and Samuel and Ann trusted and relied upon such relationship and upon the trustworthiness, integrity and fidelity of Samuel [1 C.T. p. 155, lines 26-31])

(d) That Ann would have made the necessary changes in her Will and in the Ann Trust #1 to leave all of her property, jewels and furs directly to Mitzi except for the fact that Ann trusted Samuel and relied upon his trustworthiness, honesty, integrity and fidelity to honestly carry out the Agreement which Ann made with Samuel for Mitzi's benefit. [1 C.T. p. 155, lines 11-16

The mere fact that Samuel openly and voluntarily discussed the Agreement on a number of occasions with at least *five* different witnesses, namely, *Mitzi, Lillian Small, Phil Malkin, Elaine Benedict* and *Stanley*, clearly indicates that there was no secret understanding between Ann and Samuel to conceal the Agreement. (See footnote 3, *supra.*) In addition, we point out that at no time did Samuel ever mention to anyone that he would attempt to conceal the Agreement in order to obtain the marital deduction.

Actually, most of Samuel's statements reiterating the Agreement were made shortly after Ann's death. *Samuel's concealment of the Agreement only occurred after Samuel met and married Ruth and decided to breach the Agreement.* [See Findings of Fact 27-31, 1 C.T. p. 160, line 25, to p. 163, line 1, all of which are uncontroverted.]

Furthermore, as we have previously pointed out, the trial court found that Ann did not at any time have any reason to suspect that Samuel would do anything illegal or irregular in the method he chose to carry out the Agreement, and if Samuel intended to or did act contrary to any legal technicalities, Ann had no knowledge thereof or responsibility therefor, and that she acted in good faith at all times. Further, the court concluded that the Agreement was legal and did not require any of the parties to do anything illegal in performing it. The evidence fully supports these Findings and Conclusion, and try as they can, Appellants have been unable to point to any single bit of affirmative testimony that would in any way even tend to contradict these Findings and Conclusion.[1]

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[1]In discussing this matter, the trial court in its Memorandum Opinion filed herein, stated as follows:

"In this connection, it is the Court's view that the evidence fails to establish that Ann had any part in choosing the method by which her will was to be carried out, or that she had any particular knowledge of the technical aspects of a marital deduction. Sam, with his admittedly dominant personality, was the mastermind in the management of all business and legal affairs and in the choice of lawyers and consultants. Ann was merely a housewife, with little more than ordinary housewife experience. Nothing in the evidence indicates that she was not in good faith in reposing trust in her husband, or that she had reason to suspect there was anything illegal or irregular in the method that her husband, with his reputed honesty and reliability, would choose to employ to carry out her wishes. Under the conditions here, it can certainly be said that there was an implied covenant of good faith and fair dealing; that neither party would do anything to injure the rights of the other to receive the benefits of the agreement. The agreement that Ann had called upon her husband to carry out did not require the parties to do anything illegal in performing it. The Court is of the opinion that Ann was in good faith. If Sam, in performing the Agreement, acted contrary to certain legal technicalities, this would not involve Ann to the extent of vitiating the agreement . . . The Court believes

(This footnote is continued on next page)

We also point out there is a basic inherent inconsistency in Appellants' argument that the parties intended to conceal the Agreement for the purpose of obtaining an illegal marital deduction. Throughout the trial below, and, indeed, in the Brief, page 7, Appellants asserted that Samuel "was a man of forceful character and complete integrity." Further, Appellants have consistently and persistently taken the position that Samuel was a brilliant businessman, completely and fully tax-oriented and with full knowledge of the provisions of law pertaining to marital deductions, and that he knew that no limitations could be placed upon the right of the survivor to dispose of marital deduction trust property to whomever he pleased without the loss of the marital deduction. In light of these admitted facts, the Appellants would have this Court now believe, contrary to the facts as found by the trial court and contrary to Appellants' arguments in the trial below, that Samuel suddenly lost his integrity and entered into an agreement with Ann to illegally evade taxes. Indeed, in the closing arguments, counsel for Appellants stated that he didn't believe the evidence indicated that either Ann or Samuel would be susceptible to such a scheme, and he further stated that it was ex-

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that the method by which this was to be accomplished was, in good faith, left by Ann entirely to the discretion of her husband, and there is nothing in the evidence to indicate that Ann suspected or had reason to suspect that the agreement her husband was to carry out required him to do anything illegal, or that Sam, in any circumstances, would break faith by not pursuing a legally acceptable procedure which would assure the performance of the agreement." [3 C.T. p. 750, line 18, to p. 751, line 7; p. 757, lines 20-27.]

tremely doubtful that Ann particularly, would be a party to such a scheme. [18 R.T. p. 4513, lines 19-25.] In view of these statements, we are completely at a loss to understand the Appellants' present argument directly to the contrary. The only logical explanation would appear to be that, having been forced by all of the evidence in the record to concede the Agreement existed, Appellants are now clutching at straws in an endeavor to in some manner prevent the Court from enforcing the Agreement. Although there is no rule of law preventing Appellants from completely reversing the position taken in their closing arguments before the trial court on this subject, nevertheless, we submit that such a radical change of position should be viewed with a jaundiced eye, especially when Appellants are unable to find any *affirmative* evidence to support it.

Under these circumstances, the Court's statement in *Platt*, quoting with approval from 12 Cal. Jur. 2d, Section 69, p. 272, is directly in point:

> "'If an agreement which *does not provide for a method of accomplishing its purpose can be accomplished by any legal method, it must be assumed that such method was contemplated when the contract was made and will be pursued*, and it will not be presumed that the parties intended to perform in an illegal manner. Moreover, where a contract can be performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner.'" (*Platt, supra*, p. 666; italics ours.)

There are numerous California decisions which fully support the foregoing rules, *i.e.*:

a. *If a contract can be performed legally, it will not be presumed that the parties intended that it be performed illegally.*

Fadel v. Slayman, 84 Cal. App. 2d 6, 9;

Freeman v. Jergins, 125 Cal. App. 2d 536, 546;

DuPre v. Bogumill, 173 Cal. App. 2d 406, 413.

b. If a contract can be performed in a legal manner, it will not be declared void because it was in fact performed in an illegal manner. (As we have demonstrated, the "illegal" act allegedly complained of was done by Samuel *alone, after Ann's death, in breach rather than in performance of the Agreement.*)

Vagim v. Brown, 63 Cal. App. 2d 504, 507-510;

Freeman v. Jergins, 125 Cal. App. 2d 536, 546;

DuPre v. Bogumill, 173 Cal. App. 2d 406, 413-414.

c. *If a contract can be performed legally and illegally, and no mode of performance is provided therein, it will be assumed that the parties contemplated and contracted for lawful performance.*

West Covina Enterprises, Inc. v. Chalmers, 49 Cal. 2d 754, 759;

DuPre v. Bogumill, 173 Cal. App. 2d 406, 413;

Levelon Builders, Inc. v. Lynn, 194 Cal. App. 2d 657, 663.

Respondent's Brief pages 45-51.

It is well settled that transactions between husband and wife are subject to the general rules concerning persons occupying *confidential* relationships with each other. *Civil Code*, Section 158.

In *Estate of Marsh*, 151 Cal. App. 2d 356, at 360, the rule is stated:

> "It is well settled that transactions between husband and wife are subject to the general rules that control persons occupying confidential relations with each other. . . ."
>
> "If a husband obtains an advantage over his wife he must show that he has not abused the confidence reposed in him by her. He has the burden of showing that his transactions with her were fair and just and fully understood by her. And if he fails to so show, the presumption arises that such transactions were made under undue influence and were fraudulent. . . ."

Where husband and wife enter into an agreement to make certain testamentary dispositions of property, it is a breach of the confidential relationship between husband and wife for either to fail to perform his or her part of the agreement, after benefiting from the other's performance.

Day v. Green, 59 Cal. 2d 404, 411;
Brewer v. Simpson, 53 Cal. 2d 567, 589;
Orella v. Johnson, 38 Cal. 2d 693, 696-697;
Coons v. Henry, 186 Cal. App. 2d 512, 517;
Steinberger v. Steinberger, 60 Cal. App. 2d 116.

Also, in this portion of the Brief, Appellants argue that Ann intentionally failed to disclose the Agreement

in order to fraudulently obtain the benefits of the marital deduction while secretly restricting Samuel's power to dispose of the property. (Br. pp. 37-42.) This argument begs the very issue before the Court. The uncontradicted testimony of the witnesses as to what took place during the conversation in Ann's bedroom when the Agreement was made clearly established that Ann wanted to immediately change her Will and Trust to leave all of her separate property to her only surviving child, Mitzi. *If this had been done, it would have completely eliminated Samuel from Ann's Will and Trust and ended the so-called marital deduction trust previously established for Samuel's benefit.* Samuel persuaded Ann not to do so based upon his promise and agreement to give all of Ann's property to Mitzi, *which promise Ann accepted and relied upon.* The trial court's *uncontroverted* Findings so state. [1 C.T. p. 154, line 18, to p. 155, line 16.] Under these circumstances, any argument about the so-called marital deduction trust or the unrestricted power of appointment, or any discussion relative to Ann's failure to disclose the Agreement to anyone, is entirely irrelevant. We again reiterate *that the Agreement had nothing whatsoever to do with the marital deduction trust or the unrestricted power of appointment contained in Ann's previous testamentary plan.* Having breached the Agreement, Samuel took the marital deduction for his own gain to avoid taxes on Ann's property, which he was wrongfully keeping.

Also, we have pointed out that in view of the confidential relationship existing between Ann and Samuel, as husband and wife [1 C.T. p. 155, lines 27-31], Ann was entitled to, and did, rely upon the fact that Samuel would fully perform and carry out the Agree-

ment *legally and honestly*. [1 C.T. p. 155, lines 11-16.] As stated by the trial court in its Memorandum Opinion:

> ". . . Under the conditions here, it can certainly be said that there was an implied covenant of good faith and fair dealing that neither party would do anything to injure the rights of the other to receive the benefits of the agreement . . ." [C.T. p. 750, line 30, to p. 751, line 2.]

In *Brewer v. Simpson*, 53 Cal. 2d 567, at 588, the court stated the rule above enunciated by the trial court as follows:

> "Here, as in every contract, 'there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. (Citations.) *Where the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. . . .*'" (Italics ours.)

See also *Brown v. Superior Court*, 34 Cal. 2d 559, 564-565.

Further, Appellants *erroneously* argue that although requested so to do, the court failed to make special findings on the questions of whether or not prior to February 23, 1963 Ann knew the following: (a) That she had provided in her Trust and Will for a marital deduction trust for the benefit of Samuel giving him unlimited power of appointment; (b) That in order to preserve the marital deduction, Samuel was required to have an unrestricted power of appointment; and (c)

If the marital deduction for Samuel was lost, her death taxes would be doubled. (Br. p. 37, *et seq.*)

In support thereof, Appellants refer to isolated portions of the testimony of Silvertrust and Ervin. *Appellants fail to set forth the previously quoted material testimony of Silvertrust that Ann had no knowledge of tax laws* [5 R.T. p. 1298, lines 12-20], *which fully supports the court's Findings.* In view of the complicated and technical nature of the subject matter of marital deductions and unlimited powers of appointment as those phrases are used in the statutes, in *determining this matter, the trial court exercised its discretion to accept the testimony that Ann was an average housewife, without any business activity and had no knowledge of tax laws,* and rejected any contrary evidence. The court then had before it the following additional facts: (a) Ann was suffering from a terminal illness and had suffered a very serious decline approximately one month before her death, shortly after making the Agreement; (b) Samuel was the dominant personality and exercised a dominant influence in the management of all of the business and legal affairs and in the choice of lawyers, accountants, and tax consultants *and had supervised Ann's testamentary plans through his own lawyers;* (c) Samuel was capable of, and skilled in, manipulating both his and Ann's affairs and availed himself of every method for the avoidance of tax consequences and to accomplish tax savings. Since Appellants have failed to set forth all the foregoing material evidence, this objection should be deemed waived under *Binning, supra.*

Appellants complain that the court's use of the phrase, "it is doubtful" in its Findings that Ann had

no particular or clear comprehension or understanding of the phrases, "marital deduction" or "unlimited power of appointment," is tantamount to no finding whatsoever on this subject matter. On the contrary, Respondent submits that the court's Findings on this subject, *when viewed in their entirety*, clearly set forth the court's view that it did not believe that Ann comprehended, knew or understood the technical aspects of such terms. We submit that the following quoted Findings speak for themselves and that it is clear therefrom that the court did not believe Ann had any particular or clear comprehension or understanding of such matters:

> "At all times during the seven year, ten and one-half month marriage of Samuel and Ann:
>
> . . .
>
> B. Throughout her lifetime Ann was merely a housewife with little more than housewife experience. Ann had not engaged in and had little familiarity with business transactions. Notwithstanding any explanations that may have been offered to her, it is doubtful that Ann had any particular or clear comprehension or understanding at any time of the technical aspects of:
>
> 1. A 'marital deduction' or an 'unlimited power of appointment' as those phrases are defined and used in the United States Tax Statutes, or as they were used in the hereinafter set forth testamentary plan that was devised by Samuel for Ann and himself;
>
> 2. The legal requirement that in order to preserve the so-called 'marital deduction:' Samuel was required to have an unrestricted power to appoint her property to whomever he pleased;

3. The fact that if the so-called 'marital deduction' for Sam was lost, her death taxes would be doubled. . . ." [1 C.T. p. 150, line 26, to p. 151, line 17.]

Finally, we refer again to footnote 1 where the court in its Memorandum Opinion, stated:

"In this connection, it is the court's view that the evidence fails to establish that Ann had any part in choosing the method by which her will was to be carried out *or that she had any particular knowledge of the technical aspects of a marital deduction*. . . . Ann was merely a housewife, with little more than housewife experience." [3 C.T. p. 750, lines 18-25.]

Although this statement is not binding upon this Court, it may be used to assist in interpreting the Findings.

See *Estate of McAffee*, 182 Cal. App. 2d 553, 555-6; 48 Cal. Jur. 2d Sec. 277, p. 282.